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No. 88-293

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMMUNITY FOR CREATIVE NON-VIOLENCE, et al.,

Petitioners,

vs.

JAMES EARL REID,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF VOLUNTEER LAWYERS FOR THE ARTS INC., BARBARA RINGER, JOHN HERSEY, AND JOHN M. KERNOCHAN, AS AMICI CURIAE, IN SUPPORT OF THE RESPONDENT

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Interest of Amici Curiae

This brief is filed with the parties' written consent.

Volunteer Lawyers for the Arts, Inc. ("VLA") is a not-for-profit corporation which provides legal services and advice to writers, artists and composers.

Barbara Ringer was Register of Copyrights and "is the person most instrumental in drafting the 1976 (copyright revision) Act . . .", *Mills Music, Inc. v. Snyder*, 469 U.S. 153,156 (n. 17). (1985)

John Hersey is an author and journalist; he was President of The Authors League of America for several years, and also was a member of the federal Commission on New Technological Uses of Copyrighted Works.

John M. Kernochan is Nash Professor of Law at Columbia Law School; he has taught courses in copyright and intellectual property law, and is Director of the Center for Law and the Arts, at the Law School.

VLA, Ms. Ringer, Mr. Hersey and Professor Kernochan ("VLA amici") file this brief because of their concern that many writers and artists will lose rights and copyrights if the Court were to accept appellants' (and their amici curiae's) construction of the work-made-for-hire definitions of sections 101(1) and (2) of the Copyright Act (17 U.S.C.)

The VLA amici believe that construction thwarts the meaning and intention which the legislative history establishes. They submit that the 9th Circuit's recent *Dumas* decision correctly concludes that section 101(1), on which appellants and their amici rely, encompasses only works prepared by salaried employees, and that it does not include the works of independent contractors or others, whether or not prepared under a publisher's supervision and control. *Dumas v. Stefan Gommerman, et al.*, 1989 U.S. App. LEXIS 281 (Jan.13, 1989)

Introductory Statement

Committee For Creative Non-Violence, et al., ("CCNV") contends that "Third World America", sculpted by James Earl Reid ("Reid"), is a "work made for hire" within the definition of section 101(1) – i.e., "a work prepared by an employee within the scope of his or her employment." CCNV argues it had "an employment relationship" with Reid that fitted within this definition,

because it supervised his work. Reid was not a salaried employee. CCNV's amici, Magazine Publishers of America, Inc. et al. ("magazine publishers") and CBEMA/IIA, argue that section 101(1) applies to independent contractor authors who prepare works for, and under the supervision and control of, a magazine publisher, computer manufacturer, or other company.

The Court of Appeals Decision

The Court of Appeals held that Reid was not an "employee" within the meaning of section 101(1), but rather an independent contractor under the rules of agency law, so that "Third World America" could not be a work made for hire. 846 F. 2d 1484, 1494. (D.C. Cir. 1988)

The Court of Appeals also held that the sculpture could not qualify as a work made for hire under section 101(2), the second work made for hire definition, which prescribes those types of "specially ordered and commissioned" works which may be considered a work made for hire "if the parties expressly agree in a written instrument signed by them that (it) shall be considered a work made for hire."

Summary of Argument

CCNV asserts that Third World America was not a commissioned work, although it was, because CCNV exercised some degree of supervision and control over Reid; and it erroneously argues that the "very distinction between 'employee works' [sec. 101(1)] and 'commissioned works' [sec. 101(2)] lies in the supervision and control which is generally exercised by an employer." (CCNV Br., at 15.)

We submit that the purpose and intent of section 101's two-part definition of works made for hire, clearly established by legislative history, was to apply section 101(1) only to works prepared by salaried employees. As one eminent commentator put it, section 101(1) was "to be limited to salaried or like employees and would *not* include independent contractors even if their work was closely supervised and controlled." W. PATRY,

LATMAN'S THE COPYRIGHT LAW, 122 (6th ed. 1986), quoted with approval below, 846 F. 2d at 1492. This was the conclusion reached in *Dumas* on the basis of the Court's rigorous analysis of the legislative history of sections 101(1) and (2).

This history establishes that the 9 categories of commissioned works specified in section 101(2) were meant to include commissioned works written by independent contractors who were closely directed by the publisher or other party for whom they were prepared; and that commissioned works not enumerated in section 101(2), and other works by authors who were not salaried employees, were not works-for-hire.

CCNV's amici contend that an author or artist whom a publisher treats as an independent contractor under other statutes must be deemed an employee for the purpose of section 101(1), if his work is supervised and controlled by the publisher. We disagree, since section 101(1) only applies to salaried employees. Moreover, we submit that if the publisher treats the author as an independent contractor for purposes of tax, social security and other statutes, section 101(1) could not apply to him even if it were construed to encompass others than salaried employees.

Also, we submit that Sections 101(1) and (2) established new definitions of works made for hire that superseded judicial definitions of works made for hire under the 1909 Act in pre-1978 decisions.

ARGUMENT

Section 101(1) Applies Only To Works Prepared by Salaried Employees, And Not to Works by Independent Contractors Or Others — Regardless of Supervision or Direction

The decision, as in *Dumas*, that section 101(1) applies only to salaried employees, does not prevent publishers, computer manufacturers or anyone else from acquiring copyrights or rights thereunder in works prepared for them by writers and artists, so long as the publisher satisfies the applicable statute-of-frauds provision of Title 17 — i.e. so long as the publisher obtains a signed transfer that complies with section 201(d), or a signed agreement to consider a commissioned work within section 101(2) as a work made for hire; or has the work prepared by a salaried employee.

On the other hand, for reasons discussed below, if the Court were to adopt the rationale of *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 656 (2d Cir. 1966), or some variation of it, countless authors will be seriously damaged in the future.

A. *The Nature of the Legislative History*

Section 101's work-for-hire provisions evolved in the revision process conducted by the Register of Copyrights under the auspices of the House and Senate Judiciary committees. *Dumas*, 1989 U.S. App. LEXIS 281, at 163-272, PATRY/LATMAN, at 118-122. And, as House Committee Chairman Emanuel Celler explained, the legislative history of the 1976 Copyright Act in large part consists of the Register's Reports to Congress; his draft revision bills; and the comments and discussions of them by publisher, author, motion picture and other groups at panels meetings the Register conducted — all published in the 6 House Committee Prints entitled COPYRIGHT LAW REVISION - Parts 1 to 6. Chairman Celler said the contents of the Prints, and the pre-1961 Copyright Law Revision Studies, "served as the basis for the preparation of the bill H.R. 4347 and its companion S.

1006 now pending in the 89th Congress." (Part 5, p.III) Sections 101(1) and (2) appeared in their present form, with minor exception, in H.R. 4347 (1965-66).

This legislative history is extremely significant in construing sections 101(1) and (2) for it details how and why the for-hire definitions evolved – in 4 four different stages – from the Register's initial 1961 proposal to their present form. The Register prepared these definitions, and major changes he made in each stage were prompted by the comments and positions taken by publisher and motion picture groups ("user groups") and author groups, and by the compromises they made.

The House Judiciary Committee said "the development of the work-made-for-hire provisions of the 1965 revision bill (H.R. 4347) is reviewed in detail at pages 66-68 of the Register's supplementary report, which accurately summarizes them as a 'carefully worked out compromise aimed at balancing legitimate interests on both sides'." The Committee Report also summarizes views of the author and user groups. (H.R. Report 2237, October 12, 1966, at 114-116.)

B. *The Scope of Section 101(1).*

The history recorded in the COPYRIGHT LAW REVISION Prints and House Report No. 2237 demonstrates that section 101(1)'s definition – "a work prepared by an employee within the scope of his or her employment" – only encompasses works made by salaried employees.

1. The Register's 1961 Preliminary Report (at 86-87) said courts "have not generally regarded commissioned works as 'works made for hire' ", and proposed the prospective Bill define works made for hire as "works created by an employee within the regular scope of his employment". The Report said this "more precise definition" (there was none in the 1909 Act) would exclude commissioned works from the for-hire category.

2. The second stage was the for-hire definition that appeared in the Register's 1963 draft bill: "a work prepared by an employee

within the scope of the duties of his employment, but not including a work made on special order or commission." Section 14 (c), n.11, COPYRIGHT LAW REVISION, Part 3. Throughout the subsequent for-hire debate, representatives of user groups recognized and understood that this definition encompassed only works prepared by salaried employees, and did not include works prepared by independent contractors or anyone else – even though written at the instance and under the direction of the publisher or other user.

Thus, Horace Manges, representing the book publisher groups, objected to the definition because ".. There would be a necessity of putting people on the payroll whom the employers wouldn't want to put on the payroll . . ." [June 11, 1963] COPYRIGHT LAW REVISION, Part 3, at 259. The American Book Publishers Council stated that the definition would "include only work done by a salaried employee in a scope of his regular duties and would exclude works made on special order or commission." COPYRIGHT LAW REVISION Part 4, at 250. Similar statements were made by representatives of other user groups. See Hardy, COPYRIGHT LAW'S CONCEPT OF EMPLOYMENT: WHAT CONGRESS REALLY INTENDED, 35 Journal of the Copyright Society of the U.S.A, (April 1988) 210, 226, 227, 232-235.

C. *Supervision and Control are Irrelevant To Section 101(1)*

Because user groups recognized that salaried-employee status, and not supervision and control, was the test of the proposed 1961 definition and the 1963 Bill's definition, they urged the Register to add a second clause to define specially commissioned or ordered works as works made for hire.

1. The Register's Supplementary Report on H.R. 4347 (1965) said the 1963 bill's definition "was strongly opposed by book publishers, among others, on the ground that there are a great many works which for practical reasons are 'prepared on special order or commission' but which by their nature deserve to be treated as works made for hire" and which "are prepared at the

instance, *direction*, and risk of the publisher or producer." (emphasis added). COPYRIGHT LAW REVISION, Part 5, at 66-67.

For example, the American Textbook Publishers Institute, stated that publishers had encyclopedias and other reference works prepared "under their *supervision and control* . . . and that it is not possible to "hire these specialists as employees on a full time basis." COPYRIGHT LAW REVISION, Part 3, at 340-341. (emphasis added). Later, the Institute and the American Book Publishers Council submitted a statement (June 1964) again objecting to excluding commissioned works from the work-made-for-hire category. They proposed a two-part definition : "(a) a work created by an employee within the scope of his employment"; and (b) a work created on special order or commission if the parties so agree in writing."

2. Accepting their proposal for the reasons given in his 1965 Supplementary Report, the Register produced his third version of the for-hire definition in his 1964 Bill : "A 'work made for hire' is a work prepared by an employee within the scope of his employment, or a work prepared on special order or commission if the parties expressly agree in writing that it shall be considered a work made for hire." H.R. 11947, H.R. 12354, sec. 54 (1964).

The Supplementary Report said that this change "drew even heavier fire" from authors' groups who feared that general interest books — novels, biographies, histories, and other categories — might be deemed commissioned works because often publishing contracts are signed, and advances against royalties are paid, before a book is written or completed. The Register said authors groups feared that should this interpretation ever prevail, authors would be compelled to sign contracts containing an express agreement that the book be considered a work made for hire. The Register also noted that many works written on special order or commission, such as serious music or choreography, should not be considered works made for hire. COPYRIGHT LAW REVISION, PART 5, at 67.

3. In order to "reconcile these conflicts" between author and user groups, the Register produced his fourth version of a works-

made-for-hire definition . . . a two-part definition in sections 101(1) and (2) of H.R. 4347 (1965-1966) (ibid, at 67). The 1965 section 101(1) definition is the same as its counterpart in the 1976 Act. The 1965 section 101(2) provides as does the 1976 Act that "a work specially ordered and commissioned use for as (specifying categories of works)" shall be a work made for hire "if the parties expressly agree in writing that the work shall be considered a work made for hire."

H.R. 4347 initially specified the first 4 categories contained in the present section; more were added in its final version, reported by the Judiciary Committee on October 12, 1966 (Report No. 2237). The Supplementary Report stressed that only those categories of specially ordered and commissioned works enumerated in section 101(2) may be considered a work made for hire. "Other works made on special or order or commission would not come within the definition." ibid, at 67-68.

4. The legislative history shows distinctly that section 101(2) was written to deal with the status of works prepared by "freelance authors" — independent contractors — at the "instance, direction and risk " of the company for which they were being prepared. The Register, the Judiciary Committee and the user groups who participated in the drafting of the made-for-hire definitions deemed works created this way to be "specially ordered or commissioned works" - as are Reid's statue, articles and stories written by independent contractors for the magazine publisher amici, and software programs and other works prepared by independent contractors for CBEMA and IIA member companies. Supervision and control do not take these works out of the reach of section 101(2) — it was drawn to include with works prepared at the direction, the supervision and control, of the publisher. As the previously quoted statements of publishers and the Register's Report show, the publishers stressed that they supervised and directed preparation of the commissioned works involved, — and that was one of the primary reasons they advanced in urging that section 101(2) be added — to permit these works, prepared under their supervision and control, to be considered made for hire, if the author or contractor consented.

The Register stressed that types of commissioned works not enumerated in section 101(2) cannot be works made for hire. This, because the purpose of the 1965 author-user compromise, accepted by the Register and the House Judiciary Committee was to prevent commissioned works other than those enumerated in section 101(2) from being considered as works made for hire — in order to protect independent contractor authors against being deprived of their author status under section 201(a).

5. The initial decision in the Register's drafting of the for-hire definition was that only works prepared by salaried employees should be defined as works made for hire. That was modified by the 1965 compromise to provide that certain categories of commissioned works, but only those, could be treated as works made for hire - if the writer or artist signed a written agreement stating that.

Aldon reached the wrong result because the court apparently did not read the legislative history. Here, the Court of Appeals reached the correct result because it read the history, but did not fully apply it. THIRD WORLD AMERICA is a commissioned work; and it is not one of the categories enumerated in section 101(2). Beyond that, CCNV's claim of section(1) employee status (based on supervision and control) is unfounded, because Reid was not a salaried employee.

D. *Threats to Authors If An* Aldon *Supervision and Control Test is Adopted*

If a supervision and control test is read into section 101(1), as CCNV and its amici urge, authors face considerable risk — beginning with the difficulty of being able to predict, or even be aware, that they are entering into a work-made-for-hire relationship.

1. Their statute-of-frauds protection under sections 204(a) and 101(2) will be eroded. If section 101(1) status is determined by a supervision and control test, rather than the "bright line" standard of salaried employment, authors are likely to face more claims of copyright ownership by publishers who could not have sustained suits under *Dumas* or the decision below, absent the

written signed document required under either section. Disproving sufficient supervision and control is more difficult than rebutting a publisher's claim of salaried employment under *Dumas*, and the results are more unpredictable. The difficulties increase with passage of time, more so if the author has died.

The uncertainty of the writer/artist-author's status under a supervision and control standard can place in doubt not only the ownership of a copyright, but also its duration — is its term life + 50 years, or 75 years from publication?

2. A supervision and control test may be interpreted by courts to classify works as "made-for-hire" because of editorial or other practices that had never been thought to negate the vesting of copyright in the writer or composer or sculptor of the work. In that event, even contracts providing that copyright will be in the author's name could not change the for-hire status of the work; that cannot be done by agreement; and authors would lose their termination rights.

A supervision and control test could destroy the 1965 compromise which the Register and the Judiciary Committee implemented in the final version of sections 101(1) and (2) to protect writers and artists against compulsion to accept work-made-for-hire status for their works, and thus preserve the termination rights the 1976 Act gave them. The thrust of the CCNV amici briefs is to accomplish that result — to circumvent the purpose of sections 101(1) and (2).

E. *Section 101(1) Is Inapplicable to Writers and Artists Whom Publishers Treat as Independent Contractors Under Other statutes*

CCNV's amici contend that writers and artists whom they identify as independent contractors must be deemed "employees" for the purposes of section 101(1) if they prepare works for a publisher or other company under its supervision and control.

That claim is untenable for the reasons just discussed. It also is untenable because in a great preponderance of situations, the writers and artists are claimed by the publishers and others in

CCNV amici's consituencies to be independent contractors for purposes of income tax, social security, unemployment insurance, and other federal and state statutes, many of which implicate supervision and control as a test of the employer-employee relationship, impose substantial obligations on employers, and provides economic advantages to employees. If a publisher claims not to exercise a sufficient degree of supervision and control over writers and artists to make them employees under those federal, state and local statutes, it should not be permitted to claim them as employees for section 101(1) purposes. To allow publishers to do so erodes the public policy of enforcing tax, social security, and other laws fairly, and results in a construction of section 101(1) which may violate authors' and artists' rights to due process.

F. *Sections 101(1) and (2) Supersede Pre-1978 Judicial Definitions of Works-Made-For-Hire*

The legislative history leaves no doubt that section 101 (1) and (2) established new definitions of works made for hire that – effective January 1, 1978 – replaced the judicial for-hire concepts of *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F. 2d. 565 (2d, Cir. 1966) and other pre-1978 decisions, as *Dumas* and the decision below properly concluded.

Brattleboro interpreted the 1909 Copyright Act which contained no definition of a "work made for hire", and it was not construing the two-part definition of section 101, which was included in the final version of H.R. 4347 reported out on October 12, 1966. The 1966 Bill's definitions of works made for hire – closely explicated by the 1966 House Report, the Register's Supplementary Report and the legislative history – were carried over into the 1976 Revision Bill, and enacted. The final 1976 House Judiciary report did not disavow the 1966 House Report or the Register's Supplementary Report.

H. *The Joint Works Question Should Not be Considered*

The question of whether THIRD WORLD AMERICA is a joint work is not presented on this appeal, and we respectfully

submit that the Court should not consider it. We do not believe that the sculpture was a joint work, and we disagree with the Court of Appeals' observations on that subject. Suggestions of ideas, instructions and directions, are not copyrightable material. The person who provides them is not a joint author of the work; his "contribution" is not protected by its copyright. We doubt that Reid had the required intent (under section 101) that his sculpture be merged with the pedestal as an inseparable or interdependent work – anymore than the authors of CATS or other recent Broadway musicals intended to merge their librettos, music or lyrics with the expensive stage sets or special effects (including steam) which are a major attraction. The joint works issue has serious implications for authors, publishers, composers, playwrights, film makers and others – and we respectfully suggest that this appeal is not the appropriate occasion for the Court to address this issue.

CONCLUSION

VLA and its co-amici curiae respectfully submit that the Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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